

**UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF NEW HAMPSHIRE**

Theresa M. Petrello

v.

Civil No. 16-cv-008-LM  
Opinion No. 2017 DNH 053

City of Manchester, et al.

**O R D E R**

Theresa M. Petrello brings this action under [42 U.S.C. § 1983](#) against the City of Manchester and Manchester Police Officer Ryan J. Brandreth, alleging violations of her First, Fourth, and Fourteenth Amendment rights. Petrello claims that Officer Brandreth violated her constitutional rights when he charged her with disorderly conduct while she was peacefully panhandling in public. Officer Brandreth moves for judgment on the pleadings on qualified-immunity grounds. Plaintiff objects.

**Standard of Review**

"The standard of review of a motion for judgment on the pleadings under [Federal Rule of Civil Procedure 12\(c\)](#) is the same as that for a motion to dismiss under Rule 12(b)(6)."  
[Frappier v. Countrywide Home Loans, Inc.](#), 750 F.3d 91, 96 (1st Cir. 2014) (quoting [Marrero-Gutierrez v. Molina](#), 491 F.3d 1, 5 (1st Cir. 2007)); see also [Portugués-Santana v. Rekomdiv Int'l Inc.](#), 725 F.3d 17, 25 (1st Cir. 2013) ("A motion for judgment on the pleadings is treated like a Rule 12(b)(6) motion to dismiss

. . . ."). Under Rule 12(b)(6), the court must accept the factual allegations in the complaint as true, construe reasonable inferences in the plaintiff's favor, and "determine whether the factual allegations in the plaintiff's complaint set forth a plausible claim upon which relief may be granted."

[Foley v. Wells Fargo Bank, N.A.](#), 772 F.3d 63, 71 (1st Cir. 2014)

(citation and internal quotation marks omitted). A claim is facially plausible "when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." [Ashcroft v.](#)

[Iqbal](#), 556 U.S. 662, 678 (2009). "Judgment on the pleadings is proper 'only if the uncontested and properly considered facts conclusively establish the movant's entitlement to a favorable judgment.'" [Zipperer v. Raytheon Co.](#), 493 F.3d 50, 53 (1st Cir. 2007) (quoting [Aponte-Torres v. Univ. of P.R.](#), 445 F.3d 50, 54 (1st Cir. 2006)).

### **Background**

The relevant facts are not in dispute.<sup>1</sup> On June 3, 2015, Petrello was peacefully soliciting donations in a public place in Manchester, New Hampshire. Specifically, Petrello was standing on the grassy area between the roadway and sidewalk on

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<sup>1</sup> The facts are summarized from Petrello's second amended complaint (doc. no. 9) and the exhibits attached thereto. See [Trans-Spec Truck Serv., Inc. v. Caterpillar, Inc.](#), 524 F.3d 315, 321 (1st Cir. 2008).

the west side of Maple Street, south of Bridge Street.<sup>2</sup> Petrello held a sign that said "Veteran. Have Proof. Anything Will Help Please." Doc. no. 9 at ¶ 19. Petrello never stepped in the road to either solicit or collect donations. Petrello did not approach or touch any passing cars unless the driver or passenger of the car gestured or indicated to her that they wanted to make a donation.

Officer Brandreth was on patrol at a nearby Seven-Eleven store and noticed Petrello panhandling with her back to the traffic light. Officer Brandreth watched as approximately seven cars stopped and handed Petrello items. Then, while the traffic light was green, a Cadillac driving northbound on Maple Street came to a complete stop and handed something to Petrello. Petrello took the item from the driver, but she did not step in the roadway. When the Cadillac stopped, a Jeep driving behind the Cadillac was forced to stop. The Cadillac then drove through the intersection, but the light turned red and the Jeep was unable to make it through the intersection. If the Cadillac had not stopped at the green light, then the Jeep would have made it through the intersection while the light was still green and would not have had to wait for the next green light.

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<sup>2</sup> At that location, Maple Street is a two-lane, one-way street with traffic heading northbound.

Officer Brandreth approached Petrello and told her that she could not stop cars. Petrello responded that she did not stop anyone. Officer Brandreth obtained Petrello's driver's license and discovered that she had been issued a summons on May 5, 2015, for being a pedestrian in the roadway. Officer Brandreth then issued Petrello a summons to appear in Manchester District Court on July 9, 2015, on one count of disorderly conduct, in violation of RSA 644:2, II(c), "for obstructing vehicular traffic." See doc. no. 9 at ¶ 25; doc. no. 9-3 at 7 of 18. Officer Brandreth did not arrest Petrello. On August 31, 2015, the charge against Petrello was nolle prossed.

Petrello alleges that the Manchester Police Department developed and implemented a policy to detain, harass, threaten, disperse, and charge panhandlers for allegedly "obstructing vehicular traffic on public streets" in violation of RSA 644:2, II(c), even when the panhandlers were in a public place and did not step in the roadway. See doc. no. 9 at ¶¶ 7, 68, 86. Petrello points to a pattern of similar police conduct, including Officer Brandreth's own conduct, and internal police department documents and emails to show the existence of the panhandling policy. Specifically, Petrello cites an email dated July 2, 2015, from Police Captain James Soucy of the Manchester Community Policing Division to all officers with the subject

line "Panhandlers." In relevant part, the email advises officers as follows:

Simply put, if a Panhandler does any of the following – you may use these options:

<u>Action:</u>	Panhandler causes traffic to slow or become impeded when accepting donations – even if they're not standing or step into a public way
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<u>Officer's Option:</u>	Charge with DOC 644:2(c) Obstructing vehicular traffic on any public street
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See doc. no. 9-1 at 37 of 39; doc. no. 9 at ¶ 10. Petrello alleges that Officer Brandreth acted pursuant to this policy on June 3, 2015, when he stopped her and charged her with disorderly conduct. See id. at ¶¶ 72, 88.

In her complaint, Petrello brings five claims under 42 U.S.C. § 1983, three against both Officer Brandreth and the City of Manchester (Counts I-III) and two against only the city (Counts IV and V). See doc. no. 9. Only Counts I-III are relevant for purposes of the instant motion. In these counts, Petrello alleges violations of her rights under the Fourth Amendment (Count I), First Amendment (Count II), and Fourteenth Amendment's Equal Protection Clause (Count III). She brings Counts I-III against the City of Manchester, under Monell v. Department of Social Services, 436 U.S. 658 (1978), for establishing a policy, practice, or custom that violated

Petrello's constitutional rights, and against Officer Brandreth in his individual capacity as a police officer.

On August 1, 2016, Officer Brandreth filed the instant motion for judgment on the pleadings on Counts I-III, asserting that he is entitled to qualified immunity, and, alternatively, that he did not violate Petrello's constitutional rights under the facts alleged in the complaint. See doc. no. 14.

### **Discussion**

Officer Brandreth argues that he is entitled to judgment on the pleadings on grounds of qualified immunity. Petrello objects, contending that the qualified-immunity issue is more appropriately resolved at the summary judgment stage after discovery is complete, and that, in any event, Officer Brandreth violated clearly established constitutional rights.

To begin, Officer Brandreth may invoke qualified immunity because he is sued in his individual capacity, rather than in his official capacity. See [Febus-Rodriguez v. Betancourt-Lebron](#), 14 F.3d 87, 91 n.3 (1st Cir. 1994). "The doctrine of qualified immunity shields officials from civil liability so long as their conduct 'does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.'" [Mullenix v. Luna](#), 136 S. Ct. 305, 308 (2015) (per curiam) (quoting [Pearson v. Callahan](#), 555 U.S. 223,

231 (2009)). “This doctrine ‘gives government officials breathing room to make reasonable but mistaken judgments,’ and ‘protects all but the plainly incompetent or those who knowingly violate the law.’” Hunt v. Massi, 773 F.3d 361, 367 (1st Cir. 2014) (quoting Carroll v. Carman, 135 S. Ct. 348, 350 (2014) (per curiam)). “Qualified immunity is an immunity from suit rather than a mere defense to liability.” Pearson, 555 U.S. at 237 (internal quotation marks omitted). “[C]ourts should evaluate claims of qualified immunity at the earliest practicable stage of litigation.” MacDonald v. Town of Eastham, 745 F.3d 8, 12 (1st Cir. 2014) (citing Hunter v. Bryant, 502 U.S. 224, 227 (1991) (per curiam)).

The qualified-immunity analysis employs a two-prong test: “(1) whether the facts alleged or shown by the plaintiff make out a violation of a constitutional right; and (2) if so, whether the right was ‘clearly established’ at the time of the defendant’s alleged violation.” Maldonado v. Fontanes, 568 F.3d 263, 269 (1st Cir. 2009) (citing Pearson, 555 U.S. at 232). Courts may consider the qualified-immunity steps in any order. See Belsito Commc’ns, Inc. v. Decker, 845 F.3d 13, 23 (1st Cir. 2016); Rivera-Corraliza v. Puig-Morales, 794 F.3d 208, 215 (1st Cir. 2015).

The “clearly established” prong has two elements:

(a) whether the legal contours of the right in question were sufficiently clear that a reasonable officer would have understood that what he was doing violated the right, and (b) whether in the particular factual context of the case, a reasonable officer would have understood that his conduct violated the right.

Stamps v. Town of Framingham, 813 F.3d 27, 33 (1st Cir. 2016)

(internal quotation marks omitted). “Whether the law was clearly established is itself a question of law for the court.”

Id. at 39 (citing Elder v. Holloway, 510 U.S. 510, 516 (1994)).

In conducting this analysis, the Supreme Court has cautioned courts “‘not to define clearly established law at a high level of generality,’ and reiterated that ‘[t]he dispositive question is whether the violative nature of particular conduct is clearly established.’” Id. (quoting Mullenix, 136 S. Ct. at 308) (emphasis in original). The inquiry “must be undertaken in light of the specific context of the case, not as a broad general proposition.” Mullenix, 136 S. Ct. at 308 (quoting Brosseau v. Haugen, 543 U.S. 194, 198 (2004) (per curiam)). “The plaintiff bears the burden of demonstrating that the law was clearly established at the time of the alleged violation, and it is a heavy burden indeed.” Mitchell v. Miller, 790 F.3d 73, 77 (1st Cir. 2015) (citing McGrath v. Tavares, 757 F.3d 20, 29 (1st Cir. 2014)). To meet this burden, the plaintiff must



[I]dentify controlling authority or a robust consensus of persuasive authority such that any reasonable official in the defendant's position would have known that the challenged conduct is illegal in the particular circumstances that he or she faced—then-existing precedent, in other words, must have placed the statutory or constitutional question beyond debate.

[Rivera-Corraliza](#), 794 F.3d at 214-15 (internal quotation marks, citations, and alterations omitted).

#### I. Fourth Amendment Claim

In Count I, Petrello alleges that on June 3, 2015, Officer Brandreth violated her “clearly established right to be free from unreasonable seizures by detaining her without reasonable suspicion that she was committing a crime and issuing her a summons without probable cause that she had violated RSA 644:2(II)(c).” Doc. no. 9 at ¶ 72.

In a § 1983 action, an officer accused of violating the Fourth Amendment “is entitled to immunity if a reasonable officer could have believed that probable cause existed to arrest.” [Cox v. Hainey](#), 391 F.3d 25, 31 (1st Cir. 2004) (quoting [Rivera v. Murphy](#), 979 F.2d 259, 263 (1st Cir. 1992)). Qualified immunity “requires a somewhat lesser showing” than probable cause, and, therefore, “in the case of a warrantless arrest, if the presence of probable cause is arguable or subject to legitimate question, qualified immunity will attach.” *Id.* (citations omitted); see also [Glik v. Cunniffe](#), 655 F.3d 78, 88

(1st Cir. 2011) (“Officers are entitled to qualified immunity ‘so long as the presence of probable cause is at least arguable.’” (quoting Ricci v. Urso, 974 F.2d 5, 7 (1st Cir. 1992))); Floyd v. Farrell, 765 F.2d 1, 5 (1st Cir. 1985) (“[Q]ualified immunity is pierced only if there clearly was no probable cause at the time the arrest was made.”).

“Probable cause exists when police officers, relying on reasonably trustworthy facts and circumstances, have information upon which a reasonably prudent person would believe the suspect had committed or was committing a crime.” United States v. Pontoo, 666 F.3d 20, 31 (1st Cir. 2011) (quoting United States v. Young, 105 F.3d 1, 6 (1st Cir. 1997)); see also Collins v. Univ. of N.H., 664 F.3d 8, 14 (1st Cir. 2011) (“When there is probable cause for an arrest, the Fourth Amendment’s prohibition against unreasonable searches and seizures is not offended.” (internal quotation marks omitted)). “The inquiry into probable cause focuses on what the officer knew at the time of the arrest, and should evaluate the totality of the circumstances.” United States v. Jones, 432 F.3d 34, 41 (1st Cir. 2005) (internal citations omitted). “The question of probable cause, like the question of reasonable suspicion, is an objective inquiry.” Holder v. Town of Sandown, 585 F.3d 500, 504 (1st Cir. 2009) (citation omitted). “The actual motive or thought process of the officer is not plumbed.” Id. (internal quotation

marks omitted). “[W]hen the facts that the officer knew are not reasonably in dispute, evaluating whether probable cause was present is a question of law.” [Baer v. Leach](#), No. 15-cv-65-JD, 2015 WL 7568585, at \*6 (D.N.H. Nov. 24, 2015) (citing [Holder](#), 585 F.3d at 504).

Here, the relevant facts surrounding Officer Brandreth’s decision are straightforward and undisputed. Officer Brandreth stopped Petrello and issued her a summons for one count of disorderly conduct, in violation of RSA 644:2, II(c), for obstructing vehicular traffic. Under RSA 644:2, II(c), a person is guilty of disorderly conduct if he “[o]bstructs vehicular or pedestrian traffic on any public street or sidewalk or the entrance to any public building . . . .” Disorderly conduct is a misdemeanor “if the offense continues after a request by any person to desist; otherwise, it is a violation.” RSA 644:2, VI. Officer Brandreth charged Petrello with disorderly conduct as a violation, not a misdemeanor.<sup>3</sup> [See](#) doc. no. 9-3 at 7 of 18.

Petrello argues that she did not violate the statute because she never actually stepped into the roadway, and thus did not directly impede traffic. The question is not, however,

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<sup>3</sup> Under New Hampshire law, a police officer may arrest a person if he “has probable cause to believe that the person to be arrested has committed a misdemeanor or violation in his presence . . . .” [See](#) RSA 594:10, I(a).

whether Petrello actually violated the statute; the relevant question is whether Officer Brandreth had arguable probable cause to believe that she did.

Officer Brandreth observed Petrello solicit a donation from the Cadillac. Her actions caused the Cadillac to stop at a green light, which in turn forced the Jeep to stop and miss the green light. While Petrello did not physically prevent any cars from moving, her interaction with the Cadillac impeded the flow of traffic on the roadway. Based on those observations, and coupled with a common sense reading of the law, a reasonable officer could have believed that Petrello obstructed vehicular traffic and violated RSA 644:2, II(c).<sup>4</sup> See generally [United States v. Vongkaysone](#), 434 F.3d 68, 73-74 (1st Cir. 2006)

("Probable cause is a common sense, nontechnical conception that deals with the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act." (internal quotation marks omitted)). Thus, Officer Brandreth had at least arguable probable cause to arrest Petrello.<sup>5</sup>

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<sup>4</sup> RSA 644:2, II(c) does not contain language limiting application of the statute to people who step in the street.

<sup>5</sup> Because the court finds arguable probable cause for arrest, there was necessarily an arguable basis for reasonable suspicion, a lower standard than probable cause, for an investigative stop. See [United States v. Mercedes-De La Cruz](#), 787 F.3d 61, 68-69 (1st Cir. 2015).

Finally, the court rejects Petrello's argument that the motion for judgment on the pleadings on Count I is premature because discovery is not complete. As explained by the First Circuit, "when the complaint provides all of the facts needed to assess the plaintiff's claim," a ruling on qualified immunity can be made at the motion to dismiss stage. See Giragosian v. Bettencourt, 614 F.3d 25, 29 (1st Cir. 2010). Importantly, because qualified immunity is an "immunity from suit," the Supreme Court has "repeatedly . . . stressed the importance of resolving immunity questions at the earliest possible stage in litigation." Pearson, 555 U.S. at 231-32 (internal quotation marks omitted).

Here, the complaint contains the facts needed to evaluate Petrello's claim. Construing all reasonable inferences in Petrello's favor and accepting her factual allegations as true, the complaint shows that a reasonable officer in Officer Brandreth's position could have believed that he had probable cause to charge Petrello with violation-level disorderly conduct.

For these reasons, Officer Brandreth is entitled to qualified immunity on the Fourth Amendment claim. Accordingly, the court grants defendant's motion for judgment on the pleadings on Count I.

## II. First Amendment Claim

In Count II, Petrello alleges that the City of Manchester's unlawful policy against panhandlers violated her First Amendment rights and chilled her exercise of those rights. Although most of the allegations in Count II are directed at the City of Manchester, Petrello also alleges that Officer Brandreth violated her "clearly established First Amendment rights to freely engage in expressive activity in a public place." Doc. no. 9 at ¶ 88. Officer Brandreth argues that he is entitled to qualified immunity on this claim because any First Amendment right he allegedly violated was not clearly established at that time.

As of June 3, 2015, a police officer in Manchester, New Hampshire would have known that soliciting contributions is expressive activity entitled to First Amendment protection. See, e.g., [United States v. Kokinda](#), 497 U.S. 720, 725 (1990); [Village of Schaumburg v. Citizens for a Better Environment](#), 444 U.S. 620, 632 (1980). However, that same police officer would not have had notice on that date that the First Amendment prohibited him from issuing a summons to a panhandler whom he reasonably believed was obstructing traffic.

On June 3, 2015, there was only one First Circuit case directly addressing panhandling in the First Amendment context, and, less than one month later, on June 29, 2015, that case was

vacated. [Thayer v. City of Worcester](#), 755 F.3d 60 (1st Cir. 2014), [vacated and remanded](#), 135 S. Ct. 2887 (2015). Because [Thayer](#) was still good law on June 3, 2015, the date of this incident, its holding is essential to the qualified-immunity question at hand.

In [Thayer](#), the First Circuit denied a First Amendment overbreadth challenge to two city ordinances, one banning aggressive panhandling and the other limiting the right to stand in public roadways and traffic islands. [See](#) 755 F.3d at 64-65. The First Circuit held that the panhandling ordinances were content-neutral time, place, and manner regulations, not content-based speech restrictions, and that the ordinances did not appear to burden substantially more speech than necessary to further the city's legitimate safety concerns. [See id.](#) at 67-75. In upholding the ordinances, the First Circuit noted that the record contained no "evidence that the police are failing to differentiate between hazardous and benign conditions when ordering demonstrators to leave or be charged with a violation." [Id.](#) at 74-75. As such, the [Thayer](#) opinion signaled that the First Amendment's protection of panhandling could yield to public safety concerns. Although the holding in [Thayer](#) was subsequently vacated, it was good law at the time of this

incident and thus supports a finding of qualified immunity in this case.<sup>6</sup>

Petrello next points to the First Circuit's decision in [Cutting v. City of Portland](#), 802 F.3d 79 (1st Cir. 2015), to argue that Officer Brandreth's conduct violated clearly established law. The First Circuit decided Cutting, however, on September 11, 2015, more than three months after Officer Brandreth's decision to issue a summons to Petrello.

Regardless, and contrary to Petrello's contention, Cutting does not stand for the proposition that a police officer violates the First Amendment where he enforces a traffic safety law against a panhandler whom he reasonably believes is obstructing the flow of traffic. In Cutting, the First Circuit struck down an ordinance that prohibited people from standing in median strips. See 802 F.3d at 81. The City of Portland, Maine passed the ordinance to address public safety issues caused by panhandling. Id. at 82. The court found that the ordinance, which banned virtually all expressive activity in the city's

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<sup>6</sup> On June 29, 2015, the Supreme Court of the United States vacated the Thayer judgment and remanded the case for further proceedings in light of its decision in [Reed v. Town of Gilbert](#), 135 S. Ct. 2218 (2015). See 135 S. Ct. 2887 (2015). In Reed, the Supreme Court clarified the standard for determining whether a government regulation is content-based or content-neutral. See 135 S. Ct. at 2226-27. And, on November 9, 2015, the United States District Court for the District of Massachusetts applied the holding in Reed to strike down both ordinances on First Amendment grounds. See 144 F. Supp. 3d 218 (D. Mass. 2015).



median strips, was not narrowly tailored to serve the city's interest in protecting public safety: "[T]he City did not try—or adequately explain why it did not try—other, less speech restrictive means of addressing the safety concerns it identified." Id. at 91. In so holding, the court explained that the City of Portland could enforce existing state and local laws prohibiting disruptive activity in roadways—including prohibitions on obstruction of traffic, disorderly conduct, and abusive solicitation—to address the city's legitimate safety concerns. See id. at 91-92.

In short, as of June 3, 2015, there was no clearly established law prohibiting an officer from issuing a summons to a panhandler whom he reasonably believed was obstructing traffic. Officer Brandreth is therefore entitled to qualified immunity on the First Amendment claim. Accordingly, the court grants defendant's motion for judgment on the pleadings on Count II.

### III. Fourteenth Amendment Claim

Finally, in Count III, Petrello alleges that the City of Manchester's unlawful policy against panhandlers violated her Fourteenth Amendment equal protection rights. In her objection to the motion for judgment on the pleadings, Petrello voluntarily withdraws any claim in Count III against Officer

Brandreth. See doc. no. 17 at 15 n.5. For that reason, the court dismisses without prejudice Count III to the extent it asserts any claim against Officer Brandreth. See generally Fed. R. Civ. P. 41(a)(2). The motion for judgment on the pleadings on Count III is therefore denied as moot.

### **Conclusion**

For the foregoing reasons, defendant's motion for judgment on the pleadings (doc. no. 14) is granted as to Counts I and II and denied as moot as to Count III. Count III, as asserted against Officer Brandreth in his individual capacity, is dismissed without prejudice. The City of Manchester is the only defendant remaining in the case.

SO ORDERED.



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Landya McCafferty  
United States District Judge

March 21, 2017

cc: Elliott Berry, Esq.  
Gilles R. Bissonnette, Esq.  
Robert J. Meagher, Esq.